

Otherwise, Applicant lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations in Paragraph 4 of the Notice of Opposition, and therefore denies them.

5. Denied.

AFFIRMATIVE DEFENSES

6. The Notice of Opposition fails to state a claim upon which relief may be granted. Opposer lacks a factual basis on which to file this opposition. Opposer lacks a legal basis on which to file this opposition.

7. Opposer acted in bad faith and with unclean hands for at least the following reasons:


- (a) Opposer knew that Applicant used its DEEP 3 mark in commerce in connection with the identified goods before filing this opposition. Applicant provided documentary evidence to Opposer proving Applicant's use of the mark in commerce before Opposer filed the opposition. Nevertheless, Opposer filed the Notice of Opposition alleging that Applicant lacked a bona fide intent to use the mark in commerce and Opposer continues to use the DEEP3 mark in willful violation of Applicant's prior rights.
- (b) Opposer knew of Applicant's prior filed application and prior rights in the DEEP 3 mark before filing Application Serial No. 76/380,739 for the mark DEEP3 on March 8, 2002, and before making any preparations for or launching any products under the mark DEEP3, and thus proceeded in willful and reckless disregard of Applicant's prior pending application and trademark rights.

- 8
00/24/2003TAR
- (c) Opposer's DEEP3 mark is identical in sound, appearance, and connotation to Applicant's DEEP 3 mark, and the goods offered in connection with the parties' respective marks are also identical and/or closely related. Opposer's DEEP3 mark so resembles Applicant's previously used mark DEEP 3 as to be likely to cause confusion, or to cause mistake, or to deceive. The U.S. Patent and Trademark Office has refused Opposer's DEEP3 application on the basis of its confusing similarity with Applicant's DEEP 3 application and Opposer admits it will be denied registration of its DEEP3 mark once Applicant's DEEP 3 mark registers. Opposer's knowing use of the identical mark is likely to cause confusion, and further constitutes bad faith and willful trademark infringement and unfair competition of Applicant's trademark rights.

WHEREFORE, Applicant prays that this opposition be dismissed with prejudice, and that Applicant's mark be granted registration.

Respectfully Submitted,

Dated: September 17, 2003



 Mark Sommers
 Linda McLeod
 Montia Givens Pressey
 FINNEGAN, HENDERSON, FARABOW,
 GARRETT & DUNNER, L.L.P.
 1300 I Street, N.W.
 Washington, D.C. 20005-3315
 Telephone: (202) 408-4000
 Facsimile: (202) 408-4400

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION was served on September 17, 2003, by U.S. mail, first-class postage pre-paid, in an envelope addressed to:

Molly Buck Richard
Thompson & Knight LLP
1700 Pacific Avenue
Suite 3300
Dallas, Texas 75201-4693

